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POLICE OFFICER'S HANDBOOK

CRIMINAL CONSPIRACY

CUSTODIAL QUESTIONING
WITHOUT WARNINGS

CONSENT SEARCHES...
MUST SUSPECT BE TOLD OF
HIS RIGHT TO REFUSE?

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FLEMING'S NOTEBOOK...Chapter 94: **STATE DOCUMENTS**

Legal Authority Regarding Police
Failure to Inform Suspect of Right
to Refuse Consent Search

Prepared under the direction of E. Fleming Mason
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LAW ENFORCEMENT - ETV TRAINING PROGRAM

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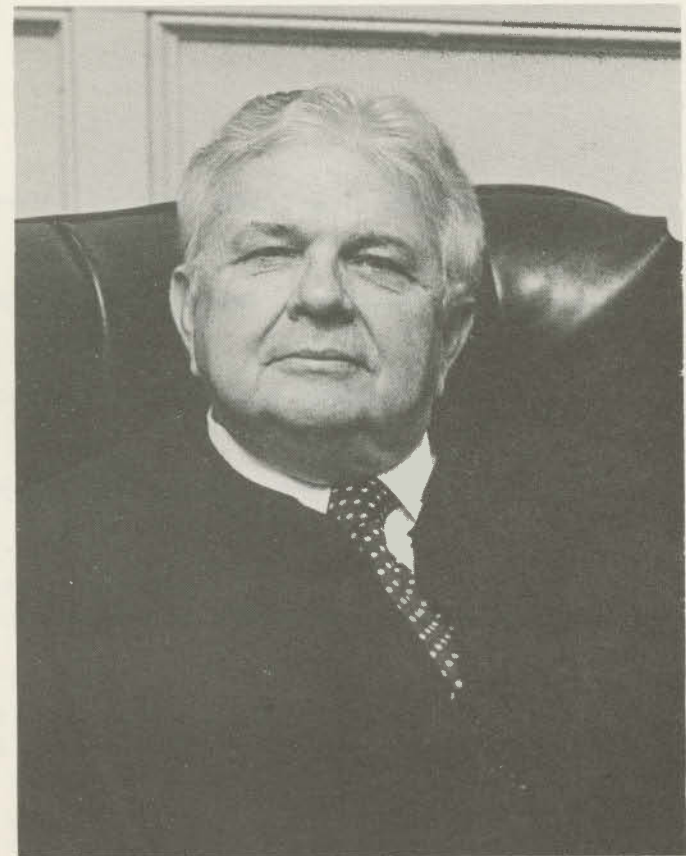
CONSENT SEARCHES...
MUST SUSPECT BE TOLD OF
HIS RIGHT TO REFUSE?

By

Joseph C. Coleman
Deputy Attorney General
State of South Carolina

Endorsed by

South Carolina Governor, John C. West
South Carolina Law Enforcement Division
South Carolina Sheriffs' Association
South Carolina Enforcement Officers' Association
South Carolina Police Chiefs' Executive Association
South Carolina FBI National Academy Associates
South Carolina Southern Police Institute Associates



Hon. William L. Rhodes
Resident Judge
Fourteenth Judicial Circuit

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FOREWORD

Criminal conspiracy is an old crime, having come to us from the common law of England. Even today, there is no specific provision in our State Code of Laws stating that criminal conspiracy is a crime, although the General Assembly by law has defined the crime and provided penalties to be imposed upon conviction.

Justification for existence of this relatively little known crime is that it is bad for society as a whole for two or more persons to plan a crime, even though it might never be carried out. But, even when the crime planned is put into effect, its planning is still a separate and distinct criminal offense. Knowledge of this common law crime and its elements can be of considerable value to police officers.

The requirements of Miranda warnings have been to some extent misunderstood and extended far beyond legitimate bounds. We shall attempt in this booklet to contribute a little toward putting the rule into its proper perspective.

Warrantless searches by police officers are often lawful, depending upon circumstances. One of those circumstances involves voluntary consent by the person having the right to give consent. We shall look briefly into a recent court decision on the definition of 'voluntary'.

William L. Rhodes

Resident Circuit Judge

Fourteenth Judicial Circuit

CRIMINAL CONSPIRACY

One of the crimes known to the common law of England was criminal conspiracy. Since the common law was made a part of the law of this State, except where changed by the Legislature, there are many acts that are criminal in our law that are not made so by our State Code of Laws.

The State Code of Laws defines the crime of criminal conspiracy, and provides penalties:

Section 16-550, S.C. Code of Laws, 1962

§16-550. CONSPIRACY. The crime known to be common law as "CONSPIRACY" is hereby defined as a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means.

The crime of conspiracy is hereby declared to be a misdemeanor, and any person found guilty of the crime of conspiracy shall be sentenced to pay a fine of not

more than five thousand dollars or to be imprisoned for not more than five years; PROVIDED, that in no event shall a person who is convicted of the crime of conspiracy be given any greater fine of sentence than he would have received had he carried out the criminal or unlawful act contemplated by the conspiracy and had he been convicted of the criminal or unlawful act contemplated by the conspiracy or had he been convicted of the criminal or unlawful acts by which the conspiracy was to be carried out or effected.

Criminal conspiracy is a misdemeanor, even though the crime planned might be a felony. This is one reason it can be a valuable tool in plea bargaining. A minor defendant will sometimes be willing to plead to a misdemeanor (conspiracy) rather than risk conviction of the crime actually committed, if it is a felony. He will often be willing to give evidence against fellow conspirators and others who committed the crime itself in exchange for favorable action by the solicitor as to him with regard to the principal crime.

Not only is criminal conspiracy a misdemeanor for which a substantial sentence may be imposed, but it does not affect the defendant's right to vote or hold public office, whereas, larceny, for example, would be disenfranchising.

NUMBER OF PERSONS REQUIRED

A person may not conspire alone, of course. So it is necessary to the crime of conspiracy that there be at least two persons involved.

WHEN CRIME PLANNED

IS NOT CARRIED OUT

The planning of a crime by two or more persons (conspiracy) is still an offense that may be punished even though the crime planned may never take place. Not even one act toward the execution of the crime planned is necessary. The planning itself is an offense, even when nothing whatever is done thereafter to put it into effect.

WHEN CRIME PLANNED

IS CARRIED OUT

When the crime planned by the conspirators is carried into effect, the defendants may be charged with two offenses...(1) Criminal Conspiracy, and (2) The crime executed as a result of the conspiracy.

EVIDENCE NECESSARY TO

PROVE CONSPIRACY

Criminal conspiracy, like most other crimes, may be proved by circumstantial evidence as well as direct evidence. It is not always necessary, for example, that the State produce a witness who actually participated in the planning and will testify to that fact, or one who actually heard the conspiracy taking place. If the facts shown are susceptible of no other reasonable conclusion than that there was a conspiracy between the persons charged, a conviction will stand even in the absence of eye-witness or ear-witness testimony.

EXAMPLES OF CONSPIRACY

I. Manufacturer A in Charlotte agrees to supply Pusher B in Greenville with a quantity of LSD to be sold in the Greenville area. The 'deal' or 'plan' is made in Charlotte, and Manufacturer A never comes into this State...either in person or by telephone. The plan is put into effect and Pusher B is caught in Greenville.

CHARGES: Both Manufacturer A and Pusher B are in violation of the drug laws of this State, in addition to any federal violation involved. Both participated in illegal acts resulting in LSD being possessed for sale in South Carolina, even though Manufacturer A never entered the State. It is as if a defendant stood in North Carolina and fired a rifle into South Carolina, murdering a person standing in South Carolina. The violator committed what is called a 'continuing' offense. He may be charged with murder in either State, but not both.

Neither Manufacturer A nor Pusher B is guilty of 'conspiracy' in South Carolina, since all the planning took place outside South Carolina.

II. Manufacturer A comes through Greenville and contacts Pusher B, resulting in a plan to furnish LSD to Pusher B for sale in the Greenville area. The plan is executed when Pusher B goes to Manufacturer A in Charlotte, picks up the LSD, and brings it into South Carolina.

CHARGES: Both Pusher B and Manufacturer A are guilty of (1) Conspiracy to Possess LSD for Sale in South Carolina and (2) Possession of LSD in South Carolina for Distribution.

Notes on Criminal Conspiracy

From Wharton's Criminal Law

And Procedure...Anderson

§82. DEFINITION. A conspiracy is a confederation to effect an unlawful object by lawful means, or by

unlawful means a lawful object. A conspiracy has also been described as a partnership in crime. The gist of the crime is the confederation or combination of minds. Any combination of two or more persons constitutes a criminal conspiracy when directed to the accomplishment either of an illegal object, or of a lawful object by illegal means.

If lawful means are employed, it is essential that the object of the conspiracy be the commission of a crime. If it is merely a trespass, there is no crime in the absence of statute so providing. Thus, a conspiracy is not criminal where its object is to obtain overinsurance, so long as no false representations are made to effect that purpose. Similarly, a conspiracy to commit an ordinary trespass *quare clausum fregit* is not a crime. If a trespass is a crime, as in the case of forcible entry and detainer, a conspiracy to commit the offense is a crime.

The legislatures or Congress may make it a crime to conspire to do with others an act which would be lawful if done individually, on the theory that the

action of two or more persons combining to achieve any object may in itself be an evil or social danger independently of whether there is evil or a social danger in the object which the group seeks to achieve or the means by which it acts to achieve it.

Independently of a statute, a combination may amount to an unlawful conspiracy although its object is the commission of an act which would be lawful if done by an individual. Accordingly, notwithstanding the absence of the element of unlawfulness in the case of individual action, it is a punishable conspiracy to combine in order (1) to maliciously injure another; (2) to commit acts which would amount to public mischief if done by a number of persons, or which tend to the oppression of others; or (3) to commit base, immoral acts which tend to defraud or corrupt. Furthermore, although one person may refuse to deal with another or with anyone who deals with him, if several persons similarly conspire together for malicious and unjustifiable purposes, with the intent to ruin such individual's business, they are guilty of criminal conspiracy.

The offense of conspiracy is defined by statute in a number of states. Some of these statutes are broadly stated and attempt to embrace all forms of conspiracy, while others extend only to specific conspiracies.

In many states having a general conspiracy statute, there are also special statutes applicable to specific conspiracies. In some states it is held that such statutory definition does not supersede the common-law offense of conspiracy, but merely creates an additional offense. In Tennessee the coexistence of statutory and common-law conspiracy is recognized by a provision declaring that a person guilty of either form of conspiracy is guilty of a misdemeanor.

In some states it is expressly declared by statute that there is no criminal conspiracy unless it comes within the statutory definition. In those jurisdictions in which there are no common-law crimes, it necessarily follows that the only conspiracies which may be punished are those which come within the scope of the statutes.

In accordance with the general principle of statutory construction that the particular prevails over the general, it is held that a statute punishing a conspiracy to commit a specific act controls over a general statute relating to conspiracies to commit any crime.

A statute penalizing criminal conspiracy is not to be interpreted as applying to a conspiracy to do an act in another jurisdiction, in the absence of an express provision to that effect, although when acts are committed within the state in performance of the conspiratorial purpose, the fact that other acts are to be performed outside the state does not prevent prosecution in the state for conspiracy in the state. In some jurisdictions it is a criminal conspiracy to conspire to commit a crime or a felony in another state. Conversely, it is provided by some statutes that it is a criminal offense to enter into a conspiracy outside of the state to commit a felony within the state, or an act of treason against the state.

By definition a conspiracy must precede the commission of a crime. Persons cannot be guilty of conspiring to commit a crime which has already been committed.

The fact that the result of a conspiracy is continuing does not make the conspiracy a continuing one. To make a continuing conspiracy, there must be continuity of action to produce the unlawful result.

At common law, apart from conspiracy to commit treason, all conspiracies were misdemeanors. Under statutes, conspiracy is frequently made a felony, or such punishment is provided that the offense is classified as a felony. In others it is classified as a misdemeanor. In some states it is variously classified as a felony or a misdemeanor depending upon the nature of the offense contemplated.

The Federal Code makes it a felony to conspire "to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose," but provides that "if, however, the offense, the commission of which is the object

of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

§83. NATURE OF AGREEMENT. If there is a common understanding to achieve a certain purpose or to act in a certain way, a conspiracy exists without regard to whether there is any formal or written statement of purpose, or even though there is no actual speaking of words. There may be merely a tacit understanding without any express agreement. An unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators.

It is not necessary that each conspirator know or see the others. It is also not necessary that each conspirator know all the details of the plan of operation; the part played by each of the conspirators; nor the division of the spoils.

To be a conspirator, the defendant must have criminally intended to become a party to the conspiracy. It is accordingly held that a person who pretends to join a conspiracy in order to trap the criminals is not a co-conspirator.

While a conspiracy is constituted by an agreement, it is the result of the agreement and not the agreement itself.

It appears that a single agreement, at least when it is in violation of but a single criminal law prohibiting conspiracies, cannot be taken to be several agreements, and hence several conspiracies, because it envisages the doing of acts constituting several separate and distinct substantive offenses, or violating several statutes rather than one. The fact that persons are charged with conspiracy to commit a number of substantive offenses and with the commission of such offenses does not make each of the substantive counts a conspiracy count, and therefore, only a single conspiracy may be imposed. Conversely, when several felonies are committed in pursuance of a single conspiracy, the responsibility for the separate felonies is not merged into one offense because committed pursuant to one conspiracy.

When a conspiracy exists, the joining of new members thereafter does not create a new conspiracy.

Conversely, if one or more of the conspirators withdraw, such withdrawal neither creates a new conspiracy nor changes the status of the remaining members.

Mere cognizance of the commission of, or plan of another to commit, a crime does not make the person having such knowledge a co-conspirator of the criminal. Thus, the fact that a lessor knows that his premises are used for an illegal purpose does not make him a party to a conspiracy to make such use of the property.

Mere sympathy with a conspiracy not exhibiting itself in overt acts does not make a person a co-conspirator, although there is authority that when the person having knowledge was under a duty to act, as in the case of a public officer, a conspiracy could be based on his failure to act. Otherwise, failure of one to prevent the carrying out of a conspiracy, even though he has power to do so, will not make him guilty of the offense of conspiracy, without further proof that he in some affirmative way consented to be a party thereto. A fortiori, persons having no knowledge of the existence of the conspiracy are not conspirators.

§84. PARTICIPATION AS PROOF OF AGREEMENT. The agreement which is the gist of the conspiracy may be shown by the conduct of the parties.

There is a conflict of authority as to the extent of participation which must be shown to establish that a given defendant has become a member of a particular conspiracy. The fact that the defendant purchased contraband articles from the conspirators with knowledge or reason to know of their contraband character does not show that the defendant is a member of the conspiracy.

If the defendant sells to a conspirator an article necessary for the accomplishment of the conspiracy, it is held that he is not guilty of conspiracy even though he knows or has reason to know of the intended illegal use. Little evidence, however, is required in addition to such knowledge on the part of the vendor to implicate him in the criminal conspiracy. For example, he has been found so guilty when, in addition to such knowledge, the defendant through advertising encouraged quantity sales of dangerous narcotics, made sales on

credit, failed to file reports of sales, or made deliveries in a way indicating a desire to conceal the crime of their being made.

A conspiracy to conceal a violation of the law is not established by proof of knowledge, nor can it be presumed from proof of a conspiracy to violate the law.

CUSTODIAL QUESTIONING

WITHOUT WARNINGS

The Miranda decision had such an impact upon police investigation that it has resulted in many areas in a situation which may be described as 'the pendulum swung too far in the other direction'.

It is too often said that, 'questioning a defendant under arrest is unlawful without Miranda warnings'. Such is not the law. Certainly, the Miranda decision did not say so.

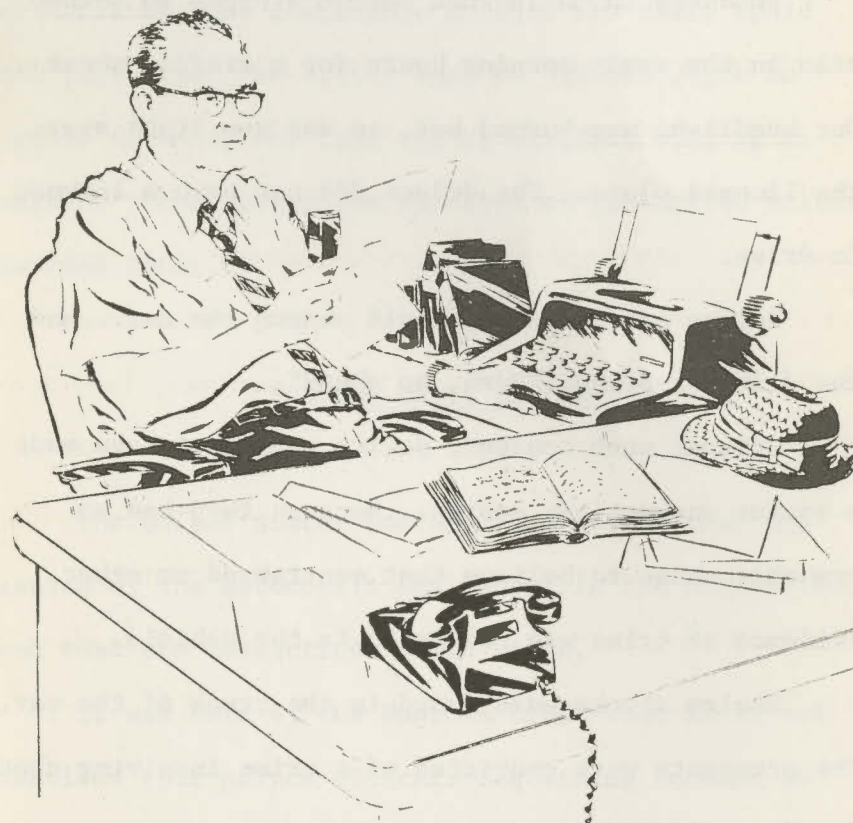
When the purpose of custodial questioning is with the object of obtaining a statement from the person being questioned to be used against him, or to get information whereby to obtain evidence against the person being questioned, that questioning is unlawful unless Miranda warnings have been given and voluntary consent given.

On the other hand, when the object of custodial questioning is to obtain information about some person other than the one being questioned, Miranda warnings

are not required, and evidence discovered as a result of such questioning is admissible against persons other than the one being questioned. Of course, no statement or other evidence thus obtained is admissible against the person being questioned.

Although it is probably safer to give Miranda warnings in most instances, there might be cases when a 'small potatoes' defendant can be lost without too much harm being done when he can supply information leading to evidence against more important suspects. If that information can be more easily obtained from a suspect in custody without Miranda warnings, questioning without warnings might be justified. Or there might be sufficient evidence against the person being questioned to make it unimportant that evidence obtained by questioning him need not be used against him to obtain a conviction.

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 94:

CONSENT SEARCHES...

MUST SUSPECT BE TOLD HE CAN REFUSE?

Recently in California police stopped an automobile in the early morning hours for a traffic check... One headlight was burned out, as was the light over the license plate. The driver did not have a license to drive.

Police asked if they could search the car...and the driver replied, "Sure, go ahead".

Without such consent, police could not have made a lawful warrantless search...because they had no probable cause to believe that contraband or other evidence of crime was concealed in the vehicle.

Stolen checks were found in the trunk of the car. The occupants were convicted of a crime involving check fraud.

The defendants appealed, charging unlawful search, arguing that the driver should have been told by police

officers that he had the right to refuse to give consent to the search...in other words, that because the driver was not so informed by the officers, his consent was not freely and voluntarily given.

First, the Federal Court ruled that the check evidence was not admissible because the State could not prove that the driver knew he had the right to refuse consent, and that the convictions must be reversed. This ruling was appealed to the United States Supreme Court.

Supreme Court Ruling

The United States Supreme Court ruled that the search of the automobile was lawful in the circumstances, and that the convictions would stand.

It was held by the Supreme Court that it is not required that police officers requesting consent to search must inform the suspect of his right to refuse. The consent must be voluntary, and the State must show that it was...but mere failure of the searching officers

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